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VIA ECFS

Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
445 12th St., SW
Washington, D.C. 20554

Re: Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming, MB Docket No. 07-269

Dear Ms. Dortch:

AT&T is attempting to use this proceeding to re-litigate its unsuccessful private program access case against Cox.[1] In doing so, it has badly mischaracterized the facts of that case and the well-reasoned decision of the Media Bureau. The Media Bureau properly recognized that AT&T does not have the right to forced access to Cox's Channel 4 SD under the Communications Act or any Commission rule. Nonetheless, rather than devoting its resources to developing its own local programming, AT&T continues to seize every opportunity to recount its inaccurate version of its litigation against Cox. Cox will not attempt to rebut all of AT&T's mischaracterizations, but will note a few of them to show that AT&T's Comments must be read with great skepticism. The facts of the program access proceeding are publicly available in FCC File No. CSR-8066-P.

AT&T continues to misrepresent Channel 4 SD as a regional sports network.[2] That is false. Cox conceived Channel 4 SD as a local origination channel and developed it from its inception into a popular local programming network. Cox has invested many millions of dollars over the past 12 years to deliver on its commitment as a long-term corporate citizen of the San Diego community, dedicated to providing quality programming of interest to the local residents. The majority of Channel 4 SD's programming is locally-themed entertainment and public affairs programming that is not sports-related. For example, Channel 4 SD produces and carries shows such as *Sam the Cooking Guy* (a local cooking show), *Brain Wave* (a local high school quiz show), *So You Made a Movie* (which showcases short films produced by San Diegans), *Forefront* (which highlights successful San Diegans and unlocks the secrets to their success), as well as several programs that concentrate on local issues of public concern, such as *Shades of San Diego* (a weekly program highlighting diversity in the community), *San Diego Insider* (the region's only regularly scheduled news magazine program), and *A Salute to Teachers* (an annual

[1] *AT&T Services Inc. and Pacific Bell Telephone Company d/b/a SBC California d/b/a AT&T California v. CoxCom, Inc.*, CSR-8066-P, Memorandum Opinion and Order, DA 09-530 (rel. Mar. 9, 2009) ("*Bureau Order*"), *app. for rev. pending.*

[2] AT&T Comments at 7.

program honoring the best of San Diego's educators). Moreover, while Channel 4 SD does carry some wonderful sports programming, including San Diego Padres games, it is not the only option – or even the main option – for local, regional or national sports programming in San Diego.

AT&T also claims that it established before the Media Bureau that lack of access to Channel 4 SD significantly hindered AT&T's "ability to offer a viable" service.[3] AT&T proved no such thing. Cox cannot respond directly to AT&T's misrepresentation of the record because AT&T designated all its competitive data as confidential, but Cox can represent that AT&T provided no competent evidence that it has suffered *any* competitive injury in San Diego. If Channel 4 SD were a "must-have" channel as AT&T repeatedly claims, AT&T should have been able to demonstrate some actual competitive harm. It failed to do so. Still less has Cox actually prevented or significantly hindered AT&T from *providing* any service, which is a required showing under Section 628(b).[4] AT&T is free to provide service to every customer reached by its facilities, and it has been competing and providing its service quite effectively.

Despite AT&T's claims, nothing in the FCC's *MDU Order* or the D.C. Circuit's decision upholding that ruling suggests that Section 628(b) gives AT&T the right to require access to any terrestrially-delivered local programming it believes will make its service more attractive to consumers.[5] Such a rule would be inconsistent with the statute and would be bad policy because it would discourage the types of investment in local programming that Cox has made in San Diego and that incumbent LECs like Verizon are making in markets like Long Island, New York.[6] For these reasons, the Commission has repeatedly rejected AT&T's interpretation of Section 628(b) as an unlimited warrant for ordering carriage of terrestrially-delivered networks like Channel 4 SD.[7]

AT&T also inexplicably asserts that the Media Bureau "found empirical evidence that Cox's withholding of Cox-4, in particular, has had a material adverse impact on video

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3 *Id.*

4 47 U.S.C. § 548(b).

5 Exclusive Service Contracts for the Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments, *Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd 20235 (2007) ("*MDU Order*"), *aff'd National cable & Telecommunications Ass'n v. FCC*, Case No. 08-1016 (D.C. Cir. May 26, 2009).

6 *See* Ellen Yan, *Verizon to Launch LI TV Channel*, NEWSDAY.COM, June 18, 2009, available at http://www.newsday.com/business/ny-bzveriz1912896022jun18,0,7453779.story ("When launched, FiOS1 Long Island - ***to be available only on FiOS TV*** - will focus on the communities and people of Nassau and Suffolk counties and will be the authoritative source Long Islanders will turn to for their news, weather and sports in their communities") (emphasis added).

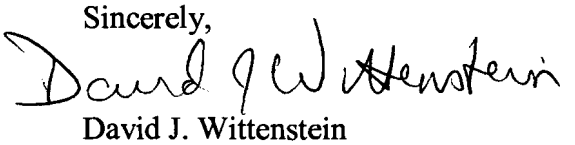
7 *RCN Telecom Servs. v. Cablevision Sys. Corp.*, 14 FCC Rcd 17093, 17105-6 ¶ 25 (Cab. Serv. Bur. 1999), *aff'd* 16 FCC Rcd 12048, at 12053 ¶ 15; DirecTV, Inc. v. Comcast, *Memorandum Opinion and Order*, 13 FCC Rcd 21822 (Cab. Serv. Bur. 1998); Echostar Communications Corporation v. Comcast, *Memorandum Opinion and Order*, 14 FCC Rcd at 2089 (Cab. Serv. Bur. 1999), *consolidated and aff'd on review, Memorandum Opinion and Order*, 15 FCC Rcd 22802, 22807 ¶¶ 12-13 (2000), *aff'd Echostar Communications Corp. v. FCC*, 292 F.3d 749 (D.C. Cir. 2002).

competition in San Diego."[8] This, too, is false. While the Bureau noted that the FCC has considered and continues to consider whether withholding terrestrially-delivered sports programming can or should be prohibited by the Commission's rules,[9] it made no finding that withholding Channel 4 SD has had any ill effect on AT&T. That the FCC is considering this question in a rulemaking means that the current rules do not prohibit such conduct, which is one reason the Media Bureau properly dismissed AT&T's case.[10]

The issues in that rulemaking are complex and deserve to be fully aired and considered by all interested parties, not changed in a private adjudication. Indeed, the issue is so complex, AT&T has two different and mutually exclusive positions on the issue. When it comes to Cox's decision not to license Channel 4 SD to AT&T, AT&T claims the effect on competition is direct and catastrophic. But when Congress asked AT&T to explain the competitive impact of its exclusive arrangement to distribute the iPhone, Paul Roth, AT&T's President of Retail Sales and Marketing, testified last week that "[i]t is widely recognized in economics and the law that such exclusive distribution arrangements . . . promote innovation, product differentiation, consumer choice and competition . . . And, as an important form of competition, they encourage other carriers and manufacturers to do better . . ."[11] When it comes to video programming, however, AT&T apparently has no desire to innovate, differentiate, improve consumer choice or "do better." It just wants immediate access to the fruits of Cox's investment in community programming in San Diego. No law or rule requires the Commission to give AT&T that access, and no policy supports that outcome.

Competition in San Diego is already thriving, and AT&T is playing an important part in that process. Contrary to its dramatic rhetoric, AT&T is not a baby that is about to be "strangle[d].... in its crib;"[12] it is one of the largest, wealthiest, and most successful communications companies in the world. It is a company that uses its own exclusivity practices – including its exclusive iPhone contracts – to differentiate its services in competition, just as Cox is doing. The Media Bureau properly dismissed AT&T's program access case against Cox, as a review of the full record in that proceeding will demonstrate.

Sincerely,



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8 *See* AT&T Comments at 8.

9 *Bureau Order* ¶ 14.

10 *See* Implementation of the Cable Television Consumer Protection and Competition Act of 1992, *Report and order and Notice of Proposed Rulemaking*, 22 FCC Rcd 17791, 17860-61 (2007).

11 Written Testimony of Paul Roth, President – Retail Sales and Service, AT&T Inc,, on An Examination of the Consumer Wireless Experience, Senate Committee on Commerce, Science & Transportation, June 17, 2009.

12 AT&T Comments at 4-5.